FILED
SEP 26 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 378

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PAUL C. FISHER d/b/a FISHER PEN COMPANY,
Petitioner,

v.

MARTIN P. DURKIN, Secretary of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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No.

PAUL C. FISHER, d/b/a FISHER PEN COMPANY,
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MARTIN P. DURKIN, Secretary of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The defendant, Paul C. Fisher, asks that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on June 17, 1953, affirming a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dated September 18, 1952.

Summary Statement of the Matter Involved

This is a case in which an individual has undertaken to defend his right to be free from unreasonable search and seizure as guaranteed to him by the Fourth Amendment to the Constitution of the United States.

This case was summarized in the opinion of June 17, 1953, issued by the United States Court of Appeals for the Seventh Circuit:

"Before MAJOR, *Chief Judge,* SWAIM, *Circuit Judge,* and BRIGGLE, *District Judge.*

" BRIGGLE, *District Judge.* Respondent is the sole proprietor of the Fisher Pen Company, located in Chicago, Illinois. His business is that of production, sale and distribution of ball point pens and precision parts for the electronics industry. This appeal is from a decision of the District Court adjudging respondent in civil contempt of that court for failure to comply with its order directing respondent to produce certain of his business records, as required by a subpoena duces tecum issued pursuant to Sections 9 and 11(a) of the Fair Labor Standards Act (Title 29 U. S. C. A. Sec. 209 and 211(a)), and Section 9 of the Federal Trade Commission Act (Title 15 U. S. C. A. Sec. 49.)[1]

" 1, Sec. 209. Attendance of Witnesses

" For the purpose of any hearing or investigation provided for in Sections 201-219 of this title, the provisions of Sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

" Sec. 211. Investigations, Inspections, and Records

" (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to Sections 201-219 of this title, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of Sections 201-219 of this title, or which may aid in the enforcement of the provisions of Sections 201-209 of this title. Except as provided in Section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investi-

" After some verbal skirmishing concerning a proposed examination of the books and records of respondent, the Regional Director of the Wage and Hour Division of the United States Department of Labor, on February 1, 1952, at the request of respondent, wrote a letter requesting permission to complete an investigation of his books and records, calling attention to the provision of Sections 9 and 11(a), *supra,* and asking respondent to reconsider his refusal to permit such investigation. On February 15, 1952, respondent answered the letter, asserting his desire to rest on the Fourth Amendment to the Constitution of the United States, he feeling the request improper inasmuch as no complaint was on record either by the Wage and Hour Division or any of his employees.

" Thereafter on March 21, 1952, the Administrator issued a subpoena duces tecum requiring the respondent to appear and bring his wage-hour records before John W.

" gations and inspections necessary under this section. Except as provided in Section 212 of this title, the Administrator shall bring all actions under Section 217 of this title to restrain violations of Sections 201-219 of this title.

" Sec. 49. * * *

" Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

" No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: * * *.

" Warsing or Gerald J. Mitchell, officers of the Wage and Hour and Public Contracts Divisions, on the 14th of April 1952, at 10 a. m. On the day named Fisher appeared in person but did not produce the records designated, and has not since produced them.

" On May 21, 1952, Application was filed in the District Court to compel compliance with the subpoena duces tecum. On the same day a show cause order issued out of the District Court, directing respondent to show cause on June 11, 1952, why an order should not issue directing the said respondent to appear before the petitioner and there produce the books, papers and documents and to give evidence as required by the subpoena duces tecum. On the 11th of June, 1952, the respondent appeared *pro se,* but did not produce the books and records and on June 27, 1952, the District Court by its order directed him to comply with the subpoena on the 28th of July, 1952, at his own place of business and "do everything which may be necessary to permit such investigation to be carried out in accordance with Section 11(a) of the Act." Respondent having failed to comply with this Order, a Petition, citing him for civil contempt was filed by the United States Department of Labor on August 11, 1952, and on the same date a show cause order was entered against respondent requiring him to show cause by September 15, 1952. A hearing was had on this order on September 15 and on September 18, 1952, the Court entered an order committing Fisher to the custody of the Attorney General for civil contempt until he should purge himself of contempt by complying with the order of June 27, or until otherwise discharged by due course of law. Commitment was stayed pending the appeal.

" Respondent (Appellant here) bottoms this review upon the assertion that the order of the District Court requiring him to produce certain records amounts to an invasion of

his constitutional rights under the Fourth Amendment (U. S. C. A. Constitution, Amendment 4), and is, therefore void and of no effect. He did not appeal from his order, but has appealed from the order of September 18th, 1952, adjudging him guilty of contempt and directing that he be committed to the custody of the Attorney General until he should purge himself of contempt by producing the books and records specified in the order of June 27, 1952.

The Department contends that respondent cannot now challenge the constitutional validity of the order of June 27th, 1952, as he did not appeal from that order. We need not labor this question, as the order of June 27th is clearly valid under the numerous decisions of the Supreme Court of the United States and other courts. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186; *Fleming* v. *Montgomery Ward & Co.,* 114 Fed. (2) 384; *Shapiro* v. *United States,* 335 U. S. 1.; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; *United States* v. *Darby,* 312 U. S. 100; *Davis* v. *United States,* 328 U. S. 582.

Respondent also urges that the order to produce is invalid because not based on a showing of probable cause. This contention cannot prevail because the authority to compel respondent to produce the documents in question is encompassed in the Congressional Act and the legislation is upon a subject within the power of Congress. The record in the instant proceeding shows that the request upon respondent was reasonable as measured by the terms of the Act and as construed by the courts and in no sense burdensome.

Respondent's thesis is based upon the well grounded belief on his part that his own private records deserve exemption from the prying eyes of others, particularly when, as he asserts, none of his employees have made any complaint and all are satisfied with the terms of their employment as relates to hours and wages. He somewhat

" assumes the attitude of the soldier who, when pressed by various Draft Boards with questions as to his whereabouts and his employment, responded with the query "Who is trying to get his nose in my business now?" The writer of this opinion is in complete sympathy with respondent in this respect, but when it comes to overriding a legislative enactment that has been held constitutionally valid by our Supreme Court, we must part company with respondent in favor of constituted authority. Respondent believes and we think sincerely, that the law in question, as enacted by Congress and interpreted by the Supreme Court is inimical to our democratic institutions, but we think he has chosen the wrong forum for presentation of his views.

" The record here does not warrant a reversal of the judgment of the District Court finding respondent guilty of contempt and will, therefore, be affirmed.

AFFIRMED."

The defendant on numerous occasions offered to open his records voluntarily to examination by the Labor Department if "probable cause" were shown (R. 34), (R. 25), (R. 14), (R. 46). These offers were ignored by the Labor Department and by the District Court.

Opinions of the Lower Courts

The opinion of the Circuit Court of Appeals is printed above. The opinion of the District Court (R. 47 to 50).

Grounds on Which Jurisdiction of this Court is Invoked

A. Basis for Jurisdiction of this Court.

The jurisdiction of this Court is invoked under (Title 28 Section 1254 U. S. C. A.) Act of June 25, 1948, Chapter 646, 62 Statutes 928.

B. The Statutes Involved.

The Fourth Amendment to the Constitution of the United States which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Sections 9 and 11(a) of the (so called) Fair Labor Standards Act (Title 29 U. S. C. A. Section 209 and 211(a)).

Section 9 of the Federal Trade Commission Act (Title 15 U. S. C. A. Sec. 49).

C. Date of the Order to be Reviewed.

The order of the Circuit Court of Appeals affirming the order of the District Court was entered June 17, 1953. This petition for *Writ of Certiorari* and supporting transcript of record are filed in this Court within ~~three~~ 90 ~~months~~ days from ~~June 17~~ July 13, 1953, on September , 1953.

Question Presented

1. Is the District Court's "Order to Produce Documentary Evidence" (which was issued without probable cause) in violation of the Fourth Amendment and therefore, unconstitutional and void?

Reasons Relied on for the Allowance of this Writ

1. The opinions of the United States Court of Appeals and the District Court *failed* to even consider the language of the Fourth Amendment.

2. The Constitutional Question involved here as it applies to the demanded "routine" search (without probable cause) of the papers of an individual has never been decided against such individual by the Supreme Court of the United States.

3. The strengthening of Government by Law demands that the Supreme Court for the benefit of the lower Courts reaffirm the validity of the Fourth Amendment.

Wherefore, I ask that a *Writ of Certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record in the case numbered and entitled on its Docket Number 10791, "Martin P. Durkin, Secretary of Labor, Petitioner, vs. Paul C. Fisher, d/b/a Fisher Pen Company, Defendant," to the end that the judgment herein of that Court may be reviewed and reversed by this Court.

PAUL C. FISHER,
Petitioner, pro se.

IN THE

Supreme Court of the United States

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No.

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Petitioner,

v.

MARTIN P. DURKIN, Secretary of Labor,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This case is adequately covered by the opinion of the United States Court of Appeals for the Seventh Circuit as herein reprinted in my "Summary Statement of the Matter Involved."

ARGUMENT

I

The District Court's "order to produce documentary evidence" violated the Fourth Amendment and was, therefore, unconstitutional and void.

The Fourth Amendment contains, first, a general guarantee:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreason-

able searches and seizures, shall not be violated, * * *"

Secondly, it designates those elements necessary to effectuate the guarantee against unreasonable searches and seizures:

> "* * *, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In order to prevent the unreasonable searches and seizures dreaded by the framers of the Amendment, enforcement of both clauses of this Amendment becomes imperative. Failure to do so, would negate the first clause in that it would permit unreasonable searches. The intended protection of this Amendment would be denied. It would lose its vitality. The Amendment is framed so as to exclude any such fallacious conclusion. This interpretation of the true meaning of the provisions in the Fourth Amendment is stated by the Supreme Court:

> "* * * The first clause of the Fourth Amendment declares: The right of the people to be secure in their persons, papers, houses and effects, against unreasonable search and seizure shall not be violated. It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was to be made and the papers taken. * * * The second clause declares: and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. This prevents the issue of warrants on loose, vague or doubtful base of facts. It emphasizes the purpose to protect against all general searches. Since before

> the creation of our new government, such searches had been deemed obnoxious to fundamental principles of liberty * * * The need for protection against them is attested by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted * * *".
>
> *Go-Bart Importing Co.* v. *United States,* (1931) 282 U. S. 344, 357.

The safeguards provided are clearly stated in the Amendment. There must be:

1. a showing of probable cause
2. which is supported by Oath or affirmation, and
3. particularity in describing the place to be searched and the persons or things to be seized.

This is a protective formula. Every provision of this formula must be met.

That they were not met in the issuance of the Court's "Order to Produce Documentary Evidence" in this case is clear.

The Government made no effort to show probable cause and indeed argued that no showing was necessary. (R. Page 21)

The District Court in its "Findings of Fact and Conclusions of Law" (Rec. Page 53, 54, 55) held that its "Order to Produce Documentary Evidence" (R. Page 27) was valid and legal irrespective of the failure to show probable cause.

Furthermore, no testimony was taken under Oath to establish the existence of probable cause and, indeed, there has never been any affirmation under Oath at any time in these proceedings to establish probable cause.

The Plaintiff's petition for the "Order to Produce Documentary Evidence" (R. page 4-9) does not even purport to be an affirmation under oath that probable cause exists. The affidavit of Edward J. Calihan Jr. attached thereto recites merely that the information contained therein is "based upon information obtained from an examination and reading of the inspection file of the Wage and Hour and Public Contracts Divisions covering the attempted inspection of the respondent; and that he believes them to be true."

This does not constitute an Oath or affirmation that probable cause exists for the search which the Plaintiff was seeking.

According to Webster's Collegiate Dictionary Fifth Edition, Page 790, published by G. & C. Merriam Co., 1946

> "Probable cause, LAW: A reasonable ground of presumption that a charge is well founded."

How can there be "probable cause" here when there wasn't even a complaint or charge of any kind against the defendant?

This is a case in which the Government has no interests of its own. There is no tax involved here and the Labor Department does not claim that they want this search in order to gather data for some Governmental purpose. It is an arbitrary and senseless search demanded without "probable cause" for no reported reason whatsoever.

The Fourth Amendment requires "probable cause," for all compulsory searches of individuals and "probable cause" by definition is a charge based upon evidence.

This demanded search was made without "probable cause" and is therefore null and void.

II

The District Court erred in ruling that the "order to produce documentary evidence" which it issued on June 27, 1952, was not a warrant within the meaning of the Fourth Amendment.

At no stage in the proceedings did the prosecuting attorneys or the Court make any claim that probable cause existed for the Court's issuance of the "Order to Produce Documentary Evidence." Their position throughout the proceedings was summed up by Judge Igoe in ruling that the Defendant was in contempt of court. The Court stated:

> "There has been no warrant here for Mr. Fisher or anything he referred to as his property." (R. Page 48)

Review of the authorities demonstrates that this ruling was clearly erroneous:

According to Black's Law Dictionary, Third Edition Page 1831

> "*Warrant,* n. 1. A writ or precept from a competent authority in pursuance of law directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage, if he does it. *People* v. *Wood,* 71, N. Y. 376"

According to Webster's Collegiate Dictionary, Fifth Edition, Page 1134

> "*Warrant,* n. 1. Authorization; sanction of law or of a superior. 2. A guaranty; security. 3. A document giving authority to do something. Specif: a. A writing which authorizes a person to pay or deliver to another and the other to receive money

> or other thing; as, a warrant on a city treasurer. b. Eng. A form of receipt given to a person who has deposited goods in a warehouse, by assignment of which the title to the goods is transferred. c. Law. A precept of writ issued by a competent magistrate authorizing an officer to make an arrest, a seizure, or a search, or the like."

According to these definitions it would appear that the Court's "Order to Produce Documentary Evidence" is undoubtedly a Warrant in the generally accepted meaning of the Word Warrant. Of course, the meaning involved here is that which was meant by the men who drafted and adopted that Constitution many years ago.

At that time, the people of this country were still smarting from the wounds left by arbitrary and dictatorial searches and seizures conducted with the aid of the notorious "Writ of Assistance".

The adoption of the Fourth Amendment resulted from the fear well expressed by Elbridge Gerry in one of his pamphlets written during the debates over the Constitution.

> "I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence."
>
> *"The Federalist and Other Constitutional Papers"*, Chicago, 1894, Albert, Scott & Co., p. 723.

The safeguards embodied in the Fourth Amendment can be better understood by considering them in the light of this historical background. The mandatory prohibitions of the Fourth Amendment were intended to forever free the citizen from further harassment of a general search and seizure.

The Fourth Amendment guards against all unreasonable searches and seizures and has been so interpreted by the Courts:

> "We are also of the opinion that an order for the production of books and papers may constitute unreasonable search and seizure within the Fourth Amendment. * * * the substance of the offense is the compulsory production of private papers, *whether under a search warrant, or a subpoena duces tecum.*" *Hale* v. *Henkel* (1906) 201 U. S. 43, 76. (Italics added.)

Substance is given to the form of the Fourth Amendment by the courts. They have required Subpoenas, and other warrants, to be predicated upon the existence of evidence—the existence of probable cause. The following illustrates an application of this principle:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * * It is contrary to the first principles of justice to allow a search through all the respondent's records, *relevant* or *irrelevant,* in the hope that something will be turned up."
>
> *Fed. Tr. Com.* v. *American Tobacco Co.,* (1924) 264 U. S. 298, 305. (Italics added.)

That the Administrator, in the exercise of his visitorial powers, must keep within the limitations prescribed by the Fourth Amendment to the Federal Constitution, was clearly expressed in the same case:

> "The analogies of the law do not allow the party wanting evidence to call for all documents in order

> to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. * * * A ground must be laid and the demand must be reasonable."
>
> *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, 306.

The requirement of probable cause has been so universally recognized as to find some recognition in almost every decision on what constitutes an unreasonable search and seizure. Quotations from a few of the cases will illustrate the complete acceptance of the test:

> "It will be conceded, of course, that an officer has no right to assume that an apparently innocent and unoffending person is actually engaged in a violation of the law. Therefore, such officer would not be acting reasonable—would be acting unreasonably—were he to subject apparently innocent and unoffending persons to search or their effects to seizure. Having no reason to believe in their guilt, it would be unreasonable to act as if they were in fact guilty."
>
> *U. S.* v. *Vatune*, (D.C., N. D. Cal., S.D.) 292 Fed. 497, 499.

The same theme can be found in the following words:

> "Doubtless many, if not all, of the documents may ultimately be required, but some necessity should be shown, either from the examination of the witness orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."
>
> *Hale* v. *Henkel*, 201 U. S. 43, 77 (1906).

The men who framed and adopted this Amendment did so because they were aware of the fact that government

by its very nature tends to be oppressive and that the history of human freedom is the history of the limitation of governmental power. This view is well expressed by the Supreme Court:

> "* * * It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or gradual deprecation of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers * * *."
>
> *Gouled* v. *U. S.* (1920) 225 U. S. 298, 304.

The only conclusion that can be objectively and honestly reached from the above is that the District Court's Order was a warrant and that "probable cause" must be shown or claimed before that order can be considered legally in conformity to the Fourth Amendment.

III

The United States Court of Appeals for the Seventh Circuit erred in applying the following dissimilar cases to this situation (R. 71):

Oklahoma Press Pub. Co. v. *Walling,* 327 U. S. 186;
Fleming v. *Montgomery Ward & Co.,* 114 Fed. (2) 384;
Shapiro v. *United States,* 335 U. S. 1;
Endicott Johnson Corp. v. *Perkins,* 317 U. S. 501;
United States v. *Darby,* 312 U. S. 100;
Davis v. *United States,* 328 U. S. 582.

The question in this case is: Can a Court legally force a search of the records of a private *individual* without "probable cause supported by oath or affirmation"?

This question was not before the Courts in any of the above cases and was not and could not be decided by the opinions rendered in those cases.

In *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, on page 190 of that case, the Supreme Court held:

> "* * * the Circuit Court of Appeals for the Tenth District * * *" held "that the administrator was entitled to enforcement upon showing of 'probable cause', which *it found had been made.*" (Emphasis supplied.)

This case differs in that there has been no finding in this case that "probable cause" exists.

This case also differs in that Oklahoma Press Pub. Co. was a *corporation* and the Supreme Court held on page 388:

> "In *Wilson* v. *United States,* supra, note 4 (221 U. S. 361, 31 S. Ct. 545, 55 L. Ed. 771, Ann. Cas. 1912 D, 558) the Supreme Court stated that the '*corporate* form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books'; and that the *corporation* had no privilege to refuse a demand 'expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case.'" (Emphasis added.)

Fleming v. *Montgomery Ward & Co.* (114 Fed. (2) 384) was again a case against a *corporation* and not against an individual and again it was agreed by all parties that "probable cause" had been shown.

In *Shapiro* v. *United States* (335 U. S. 1), the question involved was the right of an individual to claim immunity from prosecution for matters disclosed by sales records he turned over to the price Administrator pursuant to an Administrative subpoena. The Supreme Court held over

vigorous dissents by four justices that the records in question became public records by virtue of a requirement in Section 14 of Maximum Price Regulation No. 426 and that no privilege against self-incrimination attached to such records. No question involving the Fourth Amendment was before the Court or involved in its decision. In this case on the other hand the defendant is making absolutely no claims under the Fifth Amendment.

Endicott Johnson Corp. v. *Perkins,* 317 U. S. 501, is a case involving the enforcement against a *Corporation* of an administrative subpoena duces tecum issued by the Secretary of Labor in pursuance of an investigation of alleged violations of the Walsh-Healey Public Contracts Act. The Endicott Johnson Corporation was the recipient of several Government Contracts for boots, shoes, gymnasium shoes and arctic overshoes. Under those contracts the Corporation agreed to produce that material under certain conditions. The alleged violations constituted "probable cause" along with the direct Government interest.

This case did not consider nor decide the rights of an individual under the protection of the Fourth Amendment.

United States v. *Darby* (312 U. S. 100), questions the power of Congress to regulate minimum wages paid in the manufacture of goods to be shipped in interstate commerce. There was no question raised in this case as to unreasonable search or seizure. It was a test of the Fair Labor Standards Act of 1938 only in so far as the Fifth and Tenth Amendments were concerned. The application of the Fourth Amendment was not involved nor considered.

In *Davis* v. *United States* (328 U. S. 582), it was held that agents of the Office of Price Administration might lawfully seize ration coupons from an individual as a reasonable incidence of his arrest. The Court excepted "Private" papers from the scope of its ruling pointing out

that title to the coupons seized remained at all times in the government. (328 U. S. at pp. 587-588). Ration Order No. 5 C provided in s 1394.8104 (a) concerning these coupons as follows:

> "all coupon books, bulk coupons, inventory coupons, other evidences * * * are, and when issued, shall remain, the property of the Office Of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, or other evidences * * *"

The *Davis* decision was thus clearly limited to the right of an administrative agency to recover papers, title to which remained in the agency. Even if the records sought by Plaintiff in this case were "required records" this would not affect the protection afforded Defendant by the Fourth Amendment unless title to the records was vested in the Administrator.

That title is not so vested in him is clear from the language of Section 11(c) of the Fair Labor Standards Act

> "(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder."

The only right reserved to the Administrator is the right to require "reports" from such records. Section

11(c) does not make defendant's records public records or authorize the Administrator to seize them.

The Administrator himself recognized the private nature of the records he seeks by describing them in his application for an enforcement order as records "of the respondent relevant to said investigation." (SR 9)

Being private, Defendant's records are not subject to seizure without a warrant based on a showing of "probable cause supported by oath or affirmation."

It is, therefore, clear that the United States Court of Appeals for the Seventh Circuit erred in holding that the above cases decided the issue involved in this case.

IV

The United States Court of Appeals for the Seventh Circuit erred in holding: "* * * the authority to compel respondent to produce the documents in question is encompassed in the Congressional Act * * *".

Congress has no legal power to nullify the Fourth Amendment and the wording of the Acts indicates that Congress never intended to subject an individual to compulsory searches demanded without "probable cause."

Section 9 of the Federal Trade Commission Act (Title 15 U. S. C. A. Sec. 49) states:

> "Sec. 49. * * *
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any *corporation* or other person, issue an order requiring such *corporation* or other person to appear before the commission or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; * * *" (Emphasis added.)

This above clause which is adopted by reference in the Fair Labor Standards Act authorizes the Administrator to subpoena the books and records of a *CORPORATION* which is a party to a proceeding brought by the Administrator and the records in control of an individual where such individual is called as a witness in a proceeding against a *Corporation* but it DOES NOT and CAN NOT authorize the subpoenaing of the records of an individual where such individual is the party being proceeded against. This demonstrates Congress's intent not to authorize the issuance of a subpoena against an individual where the individual is the party proceeded against and no "probable cause" exists.

In commenting on Section 9 of the Federal Trades Commission Act which provides for the Administrator's subpoena powers the courts have held that this right to subpoena is governed by the prohibitions that are set in the Fourth Amendment:

> "Reading sections 5, 6 and 9, I do not think that the Congress intended, at the time of the enactment of this law, to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the Fourth Amendment of the Constitution. It is better extracted by the procedure long established in the courts in conformity with the constitutional guaranty against unlawful and unreasonable searches and seizures, and the right of people to be secure in their papers and effects, to deduce the intention that information should only be therefrom. The Fourth Amendment provides: The right of the people to be secure in their * * * papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized! This com-

mand of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within restrictions of the Fourth Amendment * * * Section 6 (b) grants to the commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the commission such information as it may require. And subdivision (a) of Sec. 6 calls upon the corporation in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers as may be privileged. In other words, there must appear to be some reasonable cause for a search, such as a definite complaint charging a specific wrong, and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of Sec. 6 would effectuate the intent of Congress, and the procedure can be kept within constitutional limits. * * * Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. See 51 Congressional Records, pt. 13, 63rd Cong. 2d Sess. pp. 12,737, 12800, 12806-11, 12918, 12,927. It was not intended to grant an unlimited power of inquisition or an unlimited power of access to books and papers of private parties

not engaged in any public service, or a search without basis of some facts tending to establish a charge of wrongdoing."

Fed. Tr. Com. v. *P. Lorillard Co.* (1922), 283 Fed. 999, 1005.

CONCLUSION

In conclusion, I submit that there is a Constitutional question involved here as to the rights and the freedom of an individual as guaranteed by our immortal "Bill of Rights" which is still the LAW of the land. The people's faith in our Government of Law and Justice demands that the issues here involved be reviewed in order that the people may understand that our Courts are still dedicated to the preservation of that *written LAW* and the *people's rights*.

Respectfully submitted,

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Petitioner, pro se.

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